

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

ROBERT M. ALMARAZ,

Petitioner,

vs.

JAMES TILTON, Secretary, CALIF.  
DEPT. OF CORR. & REHAB,

Respondent.

CASE NO. 06CV2637-LAB (AJB)

**ORDER DENYING AS MOOT  
RESPONDENT'S MOTION TO  
DISMISS**

On November 15, 2006, Petitioner, a California state prisoner, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the U.S. District Court for the Central District of California. Because Petitioner is in custody in this district, his petition was transferred to this Court on November 27, 2006. On March 26, 2007, Respondent filed a motion to dismiss the petition, but never filed an answer or motion for summary judgment. On December 13, 2007, Magistrate Judge Battaglia issued his report and recommendation (the "R&R") recommending the motion to dismiss be granted and the petition be dismissed with leave to amend. After receiving the R&R, Petitioner immediately submitted an amended petition for filing, attempting to correct the deficiencies noted in the R&R.

Pursuant to Fed. R. Civ. P. 15(a)(1)(A), if a party's pleading is one to which a responsive pleading is allowed (as is the case here), a party may amend his pleading once as a matter of course before being served with a responsive pleading. This rule applies to

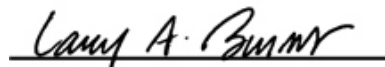
1 habeas petitions. *Anthony v. Cambra*, 236 F.3d 568, 574 (9th Cir. 2000) (citation omitted).  
2 Although Respondent filed a motion to dismiss, he did not file an answer or a motion for  
3 summary judgment. As the Ninth Circuit has explained, a motion to dismiss is not a  
4 responsive pleading within the meaning of Rule 15(a). *Rhoades v. Avon Products, Inc.*, 504  
5 F.3d 1151, 1158 (9th Cir. 2007) (citing *Miles v. Dep't of Army*, 881 F.2d 777, 781 (9th Cir.  
6 1989)).

7 Although the petition was styled "Second Amended Petition," it is actually the first  
8 amended petition. Therefore, the Court accepted it by discrepancy order on January 17,  
9 2008, directing that it be filed *nunc pro tunc* to January 15, 2008.

10 The filing of the amended petition renders Respondent's motion to dismiss moot.  
11 Because of these changed circumstances, the Court rejects the R&R's recommendations,  
12 see 28 U.S.C. § 636(b)(1)(C), and **DENIES AS MOOT** Respondent's motion to dismiss.

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14 **IT IS SO ORDERED.**

15 DATED: January 18, 2008

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17 **HONORABLE LARRY ALAN BURNS**  
18 United States District Judge  
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